

Memorandum 2016-58

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Draft Legislation to Implement the Commission’s Preliminary Decisions**

At the September meeting, the Commission<sup>1</sup> ended its search for a preliminary filtering mechanism for a legal malpractice case based on mediation misconduct. The Commission decided not to use any such mechanism, and it directed the staff to begin actual drafting of the proposed legislation for its tentative recommendation, along the lines previously decided.<sup>2</sup> This memorandum

- (1) presents draft legislation to implement the Commission’s decisions, and
- (2) discusses various drafting issues relating to the Commission’s proposed new exception to the mediation confidentiality statutes.

As directed by the Commission, another memorandum addresses whether the tentative recommendation should include any additional reforms (Memorandum 2016-59).

The following new communications are attached:

	<i>Exhibit p.</i>
• Lee Blackman (10/28/16).....	1
• Prof. Mary B. Culbert, Loyola Law School Center for Conflict Resolution (9/29/16) .....	11

The memorandum begins by summarizing what the Commission has decided so far. The staff then presents some possible language to implement those decisions. The remainder of the memorandum raises various drafting issues for the Commission’s consideration.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See *Draft Minutes* (Sept. 2016), p. 5.

## SUMMARY OF THE COMMISSION'S PRELIMINARY DECISIONS

For purposes of a tentative recommendation, the Commission decided last year to propose a new exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128), which would address attorney malpractice and other misconduct.<sup>3</sup> The Commission has since made the following additional decisions regarding preparation of the tentative recommendation:

- The exception should “only apply to alleged misconduct of an attorney acting as an advocate, not to alleged misconduct of an attorney-mediator.”<sup>4</sup>
- The exception “should only apply to evidence of misconduct that allegedly occurred in the context of a mediation.”<sup>5</sup>
- The exception “should only apply to alleged misconduct in a professional capacity.”<sup>6</sup>
- The exception should apply in a State Bar disciplinary proceeding and in a legal malpractice case. It should not apply in a proceeding relating to enforcement of a mediated settlement agreement (e.g., a proceeding to rescind a mediated settlement agreement or a proceeding to enforce such an agreement).<sup>7</sup>
- The exception “should apply evenhandedly, permitting use of mediation evidence to prove or disprove a claim.”<sup>8</sup> It does not appear necessary to expressly mention “reporting” of professional malfeasance in addition to “proving” and “disproving” such conduct.<sup>9</sup>
- The exception should “apply to all types of mediation evidence,” not just to a private attorney-client discussion or other particular type of mediation communication.<sup>10</sup>

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3. See Minutes (Aug. 2015), p. 5. Minutes (Oct. 2015), p. 4.

4. See Minutes (Oct. 2015), p. 4. For background on this decision, see Memorandum 2015-45, pp. 9-17.

5. See Minutes (Oct. 2015), p. 5. “This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session, a mediation brief, a mediation-related phone call, or other mediation-related activity).” *Id.* (emphasis in original). The determinative factor is “whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.” *Id.* For background on this decision, see Memorandum 2015-45, pp. 17-21.

6. See Minutes (Aug. 2015), p. 5.

7. See Minutes (Oct. 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 21-23, 25.

8. See Minutes (Aug. 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 25-27.

9. See Minutes (Oct. 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 25-27.

10. See Minutes (Oct. 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 31-33.

- The exception should include a provision similar to Section 6(d) of the Uniform Mediation Act (“UMA”), which limits the extent of disclosure of mediation communications.<sup>11</sup>
- The exception should not specify any sanction to impose upon a party who (1) seeks admission or disclosure of mediation evidence pursuant to the exception, (2) causes others to incur expenses or expend effort in response, and (3) ultimately fails to prevail.<sup>12</sup> Existing law on the availability of sanctions and similar consequences should be sufficient.<sup>13</sup>
- The exception should expressly state that it is not intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.<sup>14</sup>
- The exception should only apply to evidence from a mediation that commences after the exception becomes operative.<sup>15</sup>
- The exception should be placed in the Evidence Code.<sup>16</sup>
- The existing provision that makes a mediator incompetent to testify in most civil proceedings (Evidence Code Section 703.5) should remain as is.<sup>17</sup> Accordingly, the proposed new exception would not alter the circumstances under which a court must consider a mediator incompetent to testify. As under existing law, however, a mediator would not be incompetent to testify as to a statement or conduct that could “be the subject of investigation by the State Bar ....”<sup>18</sup>

The Commission has also explored whether to make the new exception subject to some kind of screening process. Initially, the Commission decided that the exception should utilize an *in camera* screening process.<sup>19</sup> After the staff

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11. See Minutes (Oct. 2015), p. 6. UMA Section 6(d) provides:

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

For background on this decision, see Memorandum 2015-45, p. 30.

12. See Minutes (Oct. 2015), pp. 6-7. For background on this decision, see Memorandum 2015-45, pp. 43-44. See also Minutes (July 2016), p. 4 (Commission “decided not to study the idea of fee-shifting in a legal malpractice case that alleges mediation misconduct.”).

13. See, e.g., Code Civ. Proc. §§ 128.5, 128.7.

14. See Minutes (Oct. 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 15-17.

15. See Minutes (Oct. 2015), p. 7. For background on this decision, see Memorandum 2015-45, p. 44.

16. See Minutes (Aug. 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 30-31.

17. See Minutes (Oct. 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 41-43.

18. Evid. Code § 703.5.

19. See Minutes (Aug. 2015), p. 5.

presented extensive information on various *in camera* screening approaches and pertinent constitutional constraints,<sup>20</sup> the Commission made clear that it was interested in finding a “constitutionally permissible method of *in camera* screening or quasi-screening that a judicial officer could use as a filter at the inception of a legal malpractice case based on mediation misconduct (an *early* way to eliminate claims that have no basis and should not result in public disclosure of mediation communications).”<sup>21</sup> Soon afterwards, the Commission ruled out any other type of *in camera* screening requirement,<sup>22</sup> while clarifying that “this would not preclude a court from using existing procedural mechanisms to restrict public access.”<sup>23</sup> The Commission proceeded to examine a number of possible mechanisms for preliminary *in camera* filtering of a legal malpractice case based on mediation misconduct,<sup>24</sup> but ultimately decided not to include any such mechanism in the tentative recommendation.<sup>25</sup>

The Commission has also discussed some issues during this study without resolving them. These include:

- Whether the proposed new exception should apply while the underlying mediated dispute is still pending.<sup>26</sup>
- Whether the proposed new exception should apply in a dispute relating to an attorney-client fee agreement.<sup>27</sup>
- Whether to require the State Bar and/or any other entity to collect some data if the proposed new exception is enacted.<sup>28</sup> Subsidiary issues concern which data to collect, and which entity, if any, should prepare a report analyzing the data collected.
- Whether the tentative recommendation should include any additional reforms, either as complements to the proposed new mediation confidentiality exception or as possible alternatives.<sup>29</sup>

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20. See Memorandum 2015-55; First Supplement to Memorandum 2015-55; Memorandum 2016-18.

21. Minutes (April 2016), p. 5 (emphasis added).

22. See Minutes (June 2016), p. 5; see also Memorandum 2016-29.

23. Minutes (June 2016), p. 5. “For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.551).” *Id.*

24. See Memorandum 2016-27 (discussing five possible filtering mechanisms); Memorandum 2016-38 (discussing Civil Code Section 1714.10 and early neutral evaluation); First Supplement to Memorandum 2016-38 (briefly discussing specialist certification and self-certification requirements); Memorandum 2016-49 (discussing specialist certification requirements). See also Minutes (April 2016), p. 5; Minutes (June 2016), pp. 4-5; Minutes (July 2016), pp. 3-4.

25. See *Draft* Minutes (Sept. 2016), p. 5.

26. See Minutes (Aug. 2015), p. 6.

27. See Minutes (Oct. 2015), p. 5. For discussion of this matter, see Memorandum 2015-45, pp. 23-25.

28. See Minutes (July 2016), p. 4. For discussion of this matter, see Memorandum 2016-37, p. 6.

29. See Minutes (Sept. 2016), p. 5.

The first three points are addressed later in this memorandum; the last one is discussed in Memorandum 2016-58.

#### DRAFT LEGISLATION TO IMPLEMENT THE COMMISSION'S PRELIMINARY DECISIONS

The decision to tentatively propose a new exception to the mediation confidentiality statute reflects the Commissioners' balancing of important, conflicting policy interests in a controversial area.<sup>30</sup> The staff's role is to help the Commission figure out the best means of implementing that policy decision (suggesting statutory language that would effectively accomplish the Commission's objective and conform to drafting conventions, identifying issues requiring resolution, pointing out technical and pragmatic difficulties, and the like).<sup>31</sup>

Having thought hard about the matter and experimented with various possibilities, the staff presents, *for purposes of initial discussion*, the following statutory language and accompanying Comments to implement the Commission's key policy decision and other drafting decisions to date:

#### Discussion Draft

##### **Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context**

SEC. \_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

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30. See Memorandum 2015-33, p. 4; see also Memorandum 2016-29, p. 14.

31. See Memorandum 2015-33, pp. 4-5; see also Memorandum 2016-29, p. 14.

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

(c) In applying this section, a court may, but is not required to, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar judicial technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

(d) Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

**Comment.** Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation. This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies: (1) a State Bar disciplinary action, which focuses on protecting the public from attorney malfeasance, and (2) a legal malpractice claim, which further promotes attorney

accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context. The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act.

Subdivision (c) gives a court discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.552). Any restriction on public access must comply with constitutional constraints and other applicable law. See, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Subdivision (d) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation"). For restrictions on mediator testimony, see Section 703.5. For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

#### **Uncodified (added). Operative date**

SEC. \_\_\_\_. (a) This act shall become operative on January 1, 2019.

(b) This act only applies with respect to a mediation or a mediation consultation that commenced on or after January 1, 2019.

**Comment.** To avoid disrupting confidentiality expectations of mediation participants, this act only applies to evidence that relates to a mediation or a mediation consultation commencing on or after the operative date of the act.

**Commissioners, stakeholders, and other interested persons should take a careful look at the above draft and consider how to improve it.**

A number of drafting issues warrant discussion. They are addressed in the next section of this memorandum.

## DRAFTING ISSUES

Many questions may arise with respect to the above draft and how it would operate in practice. Some significant issues that occurred to the staff are discussed below.

**If Commissioners or others think of additional drafting issues in reviewing the draft, it would be helpful to hear about those issues**, either in a written communication<sup>32</sup> or in oral remarks at the upcoming meeting.<sup>33</sup> Although the Commission is also interested in hearing comments on the basic policy decision underlying the discussion draft, **its focus in considering this particular memorandum at the upcoming meeting will be on drafting issues**, not on that basic policy decision.

### **Resolution of the Underlying Mediated Dispute**

The Commission has previously discussed, but has not yet decided, whether the proposed new exception should apply while the underlying mediated dispute is still pending.<sup>34</sup> In other words, should it be possible for a client to rely on the new exception to establish that an attorney misspoke at a mediation of the client's dispute, when that dispute has not been fully and finally resolved? May the attorney in that situation rely on the new exception to defend against the client's misconduct claim, perhaps by introducing evidence that the client acknowledged weaknesses in the mediated case during a private caucus with the mediator? Would that tend to chill productive mediation discussions? Would it be better to preclude use of the new exception until the mediated dispute is fully and finally resolved, so that words uttered in the mediation do not come back to haunt the mediation participants in connection with the mediated case itself (as opposed to a collateral misconduct claim)?

One way to address this set of issues would be to revise the draft of the proposed new exception to add a requirement that the underlying mediated dispute be fully and finally resolved. That could be done as follows:

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32. Written communications may be in any format. They should be emailed to <bgaal@clrc.ca.gov> or sent to the following address:

California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303

33. The meeting agenda is available at [http://www.clrc.ca.gov/Menu1\\_meetings/agenda.html](http://www.clrc.ca.gov/Menu1_meetings/agenda.html).

34. See Minutes (Aug. 2015), p. 6.

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if ~~both~~ all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(3) The underlying mediated dispute has been settled or otherwise fully and finally resolved.

(b) ....

It might be a long time, however, before a mediated dispute is fully and finally resolved, particularly if the dispute is litigated, the case proceeds to judgment, and there is an appeal. Rather than limiting the new exception as shown in ~~strikeout~~ and underscore above, the Commission might decide that other means are sufficient to prevent mediation evidence admitted or disclosed pursuant to the new exception from being used to affect the outcome of the underlying mediated dispute.

In particular,

- As directed by the Commission, the new exception would apply only in a legal malpractice case or a State Bar disciplinary proceeding based on mediation misconduct, and would include a provision modeled on UMA Section 6(d). That provision (proposed Section 1120.5(b) in the discussion draft) would expressly state that admission or disclosure of evidence pursuant to the new exception “does *not* render the evidence, or any other mediation communication or writing, admissible or discoverable *for any other purpose.*”<sup>35</sup> That limitation would seem to preclude use of the evidence in resolving the mediated dispute.
- The Commission also decided that in appropriate circumstances, a court could use existing procedural mechanisms (e.g., a sealing order) to restrict public access to evidence admitted pursuant to the new exception. Proposed Section 1120.5(c) in the discussion

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35. Emphasis added.

draft would state as much. If a court decided to admit evidence pursuant to the new exception while the underlying mediated dispute was still pending, that might be a compelling situation for the court to exercise its authority to restrict public access and thereby help to ensure that the evidence does not affect the outcome of the mediated dispute.

**Does the Commission want to rely on these constraints that it already chose to include in its proposal?**

**Would the Commission prefer to revise proposed Section 1120.5 as shown in ~~strikeout~~ and underscore above?** If so, then it might also want to consider the possibility of tolling the statute of limitations for the claims identified in proposed Section 1120.5(a)(2) until the “underlying mediated dispute has been settled or otherwise fully and finally resolved.”

### **Standard for Admissibility of Mediation Evidence**

The discussion draft would use the *same standard* for both admissibility and disclosure of mediation evidence:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, *is not made inadmissible, or protected from disclosure*, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence *is relevant* to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint ....<sup>36</sup>

The staff used this relevancy approach *solely* because it seemed *simplest to present for purposes of initial discussion*. The Commission has not yet provided clear guidance on the proper admissibility standard or the proper disclosure standard. The staff *is not making a recommendation on those matters*, because they hinge on a controversial balancing of the competing policy interests at stake in this study, which should be left to the Commissioners and ultimately the Legislature (like the key decision on creating a new exception to mediation confidentiality).<sup>37</sup>

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36. Emphasis added.

37. See Memorandum 2015-33, pp. 4-5; see also Memorandum 2016-29, p. 14.

There are many possible admissibility standards and many possible disclosure standards. This section of the memorandum discusses admissibility; the next section discusses discoverability.

UMA Section 6(b)(6), enacted in eleven states and the District of Columbia,<sup>38</sup> creates a mediation confidentiality exception for evidence of professional misconduct or malpractice during a mediation, somewhat similar to the one that the Commission is drafting. That exception does not include mediator testimony,<sup>39</sup> but otherwise encompasses *any* mediation communication that is “sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation ....” UMA Section 6(b)(6) is thus similar to the discussion draft in that it would lift the statutory protection *whenever* a mediation communication pertains to allegations of attorney misconduct in a mediation setting, without requiring assessment of any other factors, such as:

- Whether the mediation communication is only marginally relevant to the professional misconduct claim.
- Whether other evidence could be used to make the same point in the professional misconduct case instead of the mediation communication.
- Whether the mediation communication reveals highly sensitive information about a mediation participant who is not a party to the misconduct claim.

That is also true in five other states that have a mediation confidentiality exception expressly referring to attorney misconduct: Florida,<sup>40</sup> Maine,<sup>41</sup> Michigan,<sup>42</sup> North Carolina,<sup>43</sup> and Virginia.<sup>44</sup> New Mexico’s exception is similar,

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38. The UMA states are Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.

39. See UMA § 6(a)(6), (c).

40. See Fla. Stat. § 44.405(4)(a)(4) (“there is no confidentiality or privilege ... for any mediation communication ... [o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding ....”); Fla. Stat. § 44.405(4)(a)(6) (“there is no confidentiality or privilege ... for any mediation communication ... [o]ffered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.”).

41. See Maine R. Evid. 514(c)(5) (“The mediator’s privilege does not apply ... [t]o communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice by a mediation party, nonparty participant, or a party’s representative based on conduct that occurred during a mediation.”).

42. See Mich. Ct. R. 2.412(D)(10) (“Mediation communications may be disclosed under the following circumstances: ... The disclosure is included in a report of professional misconduct

but it only applies to a mediation communication that is “sought or offered to *disprove* a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant ....”<sup>45</sup>

Maryland appears to be the only other state with a mediation confidentiality exception that expressly refers to attorney misconduct or professional misconduct more generally (which would include attorney misconduct).<sup>46</sup> In contrast to the jurisdictions discussed above, Maryland limited the scope of its attorney misconduct exception based on the particular evidence and circumstances of the case at hand: The provision only permits disclosure of mediation communications “[t]o the extent necessary to assert or defend against allegations of professional misconduct or malpractice by a party or any person who was present or who otherwise participated in the mediation at the request of a party ....”<sup>47</sup> If a mediation communication was merely *relevant* to such allegations, but was not *necessary* to assert or defend against those allegations, the communication would not seem to fall within the scope of the exception.

Further variations appear in other types of mediation confidentiality exceptions. For example, UMA Section 6(b)(2) sets a relatively stiff standard for introduction of a mediation communication in a case relating to enforcement of a

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filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney disciplinary process.”); Mich. Ct. R. 2.412(D)(11) (“Mediation communications may be disclosed under the following circumstances: ... The mediation communication occurs in a case out of which a claim of malpractice arises and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant.”).

43. See N.C. Gen. Stat. § 7A-38.1(l)(3) (“Evidence of statements made and conduct occurring in a mediated settlement conference ... conducted under this section ... shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except ... [i]n disciplinary proceedings before the State Bar ....”).

44. See Va. Code Ann. § 8.01-581.22(vii) (“Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except ... where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party’s legal representative based on conduct occurring during a mediation ....”).

45. N.M. Stat. Ann. 44-7B-5(A)(8) (emphasis added).

46. For a chart summarizing which states have mediation confidentiality exceptions that expressly address attorney misconduct, mediator misconduct, and/or professional misconduct more generally, see First Supplement to Memorandum 2014-35, Exhibit pp. 6-7. For more detailed information on approaches used in other states, see Memorandum 2014-35, Exhibit pp. 5-42; see also Memorandum 2014-35, pp. 4-25 (Florida), 25-32 (Massachusetts), 32-40 (New York); Memorandum 2014-43 (Pennsylvania); Memorandum 2014-44 (Texas).

47. Md. Code, Courts & Judicial Proceedings § 3-1804(b)(2) (emphasis added). A mediator may not be compelled to testify pursuant to this exception. See *id.*

Maryland has two sets of mediation confidentiality laws. The one for court-referred mediations (Md. R. 17-105) does not include an exception that expressly refers to attorney misconduct.

mediated settlement agreement. Under that exception, it is not enough to show that the mediation communication is relevant to such a case; the proponent must also show that “the evidence is not otherwise available” and “there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.”<sup>48</sup> Such a standard is more protective of the policy interests underlying mediation confidentiality than a pure relevancy standard for admissibility.

A few other standards that might serve as models are:

- 5 U.S.C. § 574(a)(4)(C) (requiring a showing that the proffered mediation communication is “necessary to ... prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.”).
- Wisc. Stat. § 904.085(e) (requiring a showing that the proffered mediation communication “is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.”).
- Colo. Rev. Stat. § 13-22-207(d) (requiring a showing that “the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization.”).
- Kan. Stat. Ann. § 60-452a(b)(1) (requiring a showing that a mediation communication is “reasonably necessary” to allow or defend against an action against a mediator for an ethical violation).

In addition, the Commission should consider a suggestion recently made by mediator Lee Blackman, who has participated in some of the Commission meetings on this topic. He asks the Commission to

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48. UMA Section 6(b)(2) provides:

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

....

(2) except as otherwise provided in subsection (c) [precluding mediator testimony], a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

Michigan Court Rule 2.412(12) is similar.

please consider a provision or comment that would limit the scope of the new exception so that *only those mediation communications “that are ‘necessary to the determination’ of the client’s claim of lawyer malpractice or other misconduct” may become ... admissible.* Other mediation communications should continue to be protected from disclosure.<sup>49</sup>

He explains:

[T]his proposed limitation on the scope of the proposed exception to mediation confidentiality is consistent with the scope of permitted disclosure of client confidential information in legal malpractice cases that are unrelated to mediation proceedings. This proposed limitation is also important because it makes clear that the exception does not dictate an overbroad abrogation of the right of privacy embedded in Article 1, Section 1, of the California Constitution simply because lawyer misconduct in the mediation setting is alleged. Adoption of the proposed limitation will also mitigate some of the potential for abuse of the exception by frustrated litigants, mediation participants seeking negotiating leverage, or lawyers who might attempt to discourage potential claimants by threatening disclosure of embarrassing or sensitive private matters.<sup>50</sup>

Mr. Blackman provides a detailed but concise legal analysis to support his position that a mediation communication should be admissible only if it is “necessary to the determination” of a client’s claim against a lawyer for mediation misconduct.<sup>51</sup>

These are just a few examples of admissibility standards that the Commission could use in its proposed new exception to mediation confidentiality. There are other possible models, or the Commission could craft its own admissibility standard, reflecting whatever balance it wants to strike between mediation confidentiality and competing policy interests.

From a drafting standpoint, it would not be difficult to incorporate a heightened admissibility standard into the Commission’s proposal. For example, if the Commission decides to borrow the standard used in UMA Section 6(b)(2), proposed Section 1120.5 in the discussion draft could be revised as follows:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible ...

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49. Exhibit p. 1 (emphasis added).

50. *Id.*

51. See Exhibit pp. 1-2.

by provisions of this chapter if ~~both~~ all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(3) The evidence is not otherwise available.

(4) There is a need for the evidence that substantially outweighs the interest in protecting confidentiality.

Additional or different admissibility requirements could be incorporated in a similar manner.

**The Commission needs to decide which admissibility standard to use,** taking into account the competing policy interests at stake.

### **Standard for Discovery of Mediation Evidence**

In the discussion draft, proposed Section 1120.5(a) says that “[a] communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, *is not made inadmissible, or protected from disclosure,* by provisions of this chapter if ... the following requirements are satisfied ....” That opening clause is drawn directly from an existing statute, Evidence Code Section 1122,<sup>52</sup> which creates a mediation confidentiality exception where “[a]ll persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.”<sup>53</sup>

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52. Evid. Code § 1122(a). Unlike proposed Section 1120.5(a), existing Section 1122(a) refers to a “writing, as defined in Section 250.” (Emphasis added.) From a drafting standpoint, such a cross-reference is generally unnecessary and can be problematic. See *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm’n Reports 217, 250 (2009). It is usually preferable to refer to an applicable definition in an accompanying Comment, as we did in the discussion draft.

If the Commission is interested, the staff could prepare technical amendments of Evidence Code Sections 1119, 1122, and 1127, so as to follow the preferred drafting approach throughout the chapter on mediation confidentiality. The accompanying Comments would need to expressly state that those amendments are nonsubstantive.

53. Section 1122 also creates a mediation confidentiality exception where a “communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants,

Although Section 1122 and the discussion draft would treat admissibility and disclosure in the same manner, the Commission does not necessarily have to take that approach. Consider, for example, the general standards for admissibility and discoverability of evidence. To be admissible, evidence must be relevant.<sup>54</sup> To be discoverable, the standard is less stringent, at least with regard to non-privileged evidence:

Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*....<sup>55</sup>

The Commission could similarly differentiate between admissibility and discoverability in its tentative recommendation if it believes that such differentiation would be good policy.

For example, the Commission could use a heightened standard for admissibility (like the one in UMA Section 6(b)(2)), while using a pure relevancy standard for disclosure. That could be done by revising the discussion draft as follows:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, ~~or protected from disclosure~~, by provisions of this chapter if ~~both~~ all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

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those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.”

54. Evid. Code § 350 (“No evidence is admissible except relevant evidence.”); see also Evid. Code § 351 (“Except as otherwise provided by statute, all relevant evidence is admissible.”).

55. Code Civ. Proc. § 2017.010 (emphasis added).

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(3) The evidence is not otherwise available.

(4) There is a need for the evidence that substantially outweighs the interest in protecting confidentiality.

(b) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not protected from disclosure by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

~~(b)~~ (c) If a mediation communication or writing ....

**Does the Commission want to differentiate between admissibility and disclosure of mediation evidence in the exception it is proposing? If so, what standard would it like to use for disclosure?**

As with admissibility, there are many possibilities. For example, Mr. Blackman suggests that a mediation communication should only be discoverable if it is “necessary to the determination” of a client’s claim against a lawyer for mediation misconduct (i.e., it meets the same standard that he proposes for admissibility).<sup>56</sup> The Commission needs to consider which approach would best meet its policy objectives.

### **Types of Disputes in Which the New Exception Would Apply**

In accordance with the Commission’s instructions,<sup>57</sup> proposed Section 1120.5 in the discussion draft would only apply in a State Bar disciplinary proceeding or a legal malpractice claim:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or

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56. See Exhibit p. 1.

57. See Minutes (Aug. 2015), p. 5; Minutes (Oct. 2015), pp. 4, 5.

protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

....

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

....

**Comment. ...**

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies: (1) a State Bar disciplinary action, which focuses on protecting the public from attorney malfeasance, and (2) a legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context. The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

....

This aspect of the Commission's proposal presents several drafting issues.

In particular, the staff wants to draw the Commission's attention to the following issues:

- What constitutes a "State Bar disciplinary proceeding" for purposes of the Commission's proposed new exception to mediation confidentiality.
- What constitutes a "legal malpractice claim" for purposes of the Commission's proposed new exception to mediation confidentiality.
- Whether the exception should apply in a dispute relating to an attorney-client fee agreement, not just in a State Bar disciplinary proceeding and a legal malpractice case (an issue the Commission previously discussed but did not decide).

Those issues are discussed in order below.

### *State Bar Disciplinary Proceeding*

To the best of the staff's knowledge, there is not much ambiguity regarding what constitutes a State Bar disciplinary proceeding. In the discussion draft, proposed Section 1120.5(a)(2)(A) would simply refer to a "complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act." **If this language would be problematic for any reason, it would be helpful to hear why.**

### *Legal Malpractice Claim*

There clearly are some issues regarding precisely what would fall within the ambit of "legal malpractice" for purposes of the Commission's proposal. A civil case against an attorney for professional misconduct often involves multiple causes of action. In *Cassel v. Superior Court*, for example, the plaintiff

sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.<sup>58</sup>

Similarly, the *Porter* litigation (mentioned in the legislative resolution assigning this study<sup>59</sup>) included claims against a lawyer and his firm for legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of fee agreement, rescission, unjust enrichment, and liability for unpaid wages.<sup>60</sup>

**The Commission needs to resolve what it really intends to accomplish in allowing litigants to use its proposed new exception to prove or disprove allegations of "legal malpractice."** Does the Commission intend to permit the introduction of certain mediation evidence (i.e., evidence satisfying the requirements of proposed Section 1120.5(a)(1) of the discussion draft) in a "cause of action for damages against [a] lawyer based upon alleged malpractice," as stated in proposed Section 1120.5(a)(2)(B) of the discussion draft? Would this, or should this, include the introduction of such mediation evidence in a client's cause of action against a lawyer based on a contract? A fraud claim? A claim for breach of fiduciary duty? A claim for an intentional tort, as opposed to one based

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58. 51 Cal. 4th 113, 118, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

59. 2012 Cal. Stat. res. ch. 108; see also 2016 Cal. Stat. res. ch. 150.

60. See *Porter v. Wyner*, 107 Cal. Rptr. 3d 653, 658 (2010) (formerly published at 183 Cal. App. 4th 949).

on negligence?<sup>61</sup> A claim for punitive damages? A claim for something other than damages? Anything else?

Although the Commission could leave some questions for the courts to decide, it would be helpful to provide as much clarity as possible. Fortunately, the California Supreme Court recently considered a somewhat similar set of issues in *Lee v. Hanley*,<sup>62</sup> a case involving the statute of limitations for legal malpractice.

For present purposes, what is most instructive about *Lee v. Hanley* is the insight it provides into (1) the various types of misconduct claims a client can bring against an attorney, and (2) the phrases that the Legislature and others have used in referring to such claims. In the course of its opinion, the Court referred to the following:

- **“An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services ....”**<sup>63</sup> This is the phrase used in Code of Civil Procedure Section 340.6, which is commonly referred to as the statute of limitations for legal malpractice. The Court construed the phrase to apply to a claim “when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services.”<sup>64</sup> “Misconduct does not ‘aris[e] in’ the performance of professional services ... merely because it *occurs during* the period of legal representation *or* because *the representation brought the parties together* and thus provided the attorney the opportunity to engage in the misconduct.”<sup>65</sup>
- **A claim that “an attorney stole money from a client’s unattended purse.”**<sup>66</sup> The Court said that a “garden-variety theft claim against an attorney alleges wrongful conduct, but that conduct does not arise in the performance of professional services even if the client

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61. A leading treatise says:

Actions for malpractice are normally based on the claim that the attorney was negligent in the performance of his or her duties. However, an attorney may also be liable to a client for intentional wrongs committed in the course of representation. If so, the client may seek recovery for the commission of an intentional tort, malpractice, or both.

1 B. Witkin, *California Procedure Attorneys* § 286, at 361 (5th ed. 2008), *citing* *McDaniel v. Gile*, 230 Cal. App. 3d 363, 373, 375, 281 Cal. Rptr. 242 (1991) (client sued attorney for (1) breach of contract, (2) tortious breach of contract, (3) intentional infliction of emotional distress, (4) breach of the covenant of good faith and fair dealing, (5) legal malpractice, and (6) fraud).

62. 61 Cal. 4th 1225, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015).

63. See *id.* at 1229, *quoting* Code Civ. Proc. § 340.6(a).

64. *Id.* (emphasis in original); see also *id.* at 1239.

65. *Id.* at 1238.

66. *Id.* at 1231.

and the attorney were discussing legal matters at the time the theft took place.”<sup>67</sup> Accordingly, such a claim does not constitute an “action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services.” The claim for garden-variety theft can be considered a “**generally applicable nonprofessional obligation.**”<sup>68</sup>

- **A claim for conversion of a client’s funds.** This type of claim “does not *necessarily depend* on proof that [the defendant attorney] violated a professional obligation in the course of providing professional services.”<sup>69</sup> Accordingly, such a claim does not necessarily constitute an “action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services.”<sup>70</sup>
- **“Lawsuits for malpractice.”**<sup>71</sup> The Court explained that before Code of Civil Procedure Section 340.6 was enacted, “lawsuits for malpractice” were subject to different limitations periods “depending on whether the plaintiff pleaded breach of a written contract, fraud, or breach of an oral contract or a tort affecting intangible property.”<sup>72</sup>
- **“[A]ny action for damages against an attorney based upon the attorney’s alleged professional negligence.”**<sup>73</sup> This phrase was used in the original version of the bill that became Code of Civil Procedure Section 340.6.<sup>74</sup> It was later replaced with the phrase now in the statute: “[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services.”

According to the Court, the Legislature chose the latter phrase because a commentator had pointed out that “malpractice” is not a word of precise definition and is best stated in terms of the actual wrong — i.e., a wrongful act or omission in rendering professional services.<sup>75</sup> By following the commentator’s advice to replace “alleged professional negligence” with the current language, “the Legislature intended to establish a limitations period that would *apply broadly to any claim* concerning an attorney’s violation of his

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67. *Id.*

68. See *id.* at 1238.

69. *Id.* at 1240 (emphasis added).

70. See *id.* at 1240. Justice Corrigan disagreed with this conclusion. See *id.* at 1242 (Corrigan, J., dissenting) (“The majority ... holds that ... the statute ... extends only to ‘claims whose merits *necessarily depend on proof* that an attorney violated a professional obligation in the course of providing professional services’ .... This formulation has no apparent basis in the statute’s language or legislative history.”); see also *id.* at 1241-43 (explaining that client’s claim against attorney for conversion of funds advanced is an “action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services.”).

71. *Id.* at 1234.

72. *Id.* (citations omitted).

73. *Id.*, quoting AB 298 (1977-1978 Reg. Sess.), as introduced on Jan. 25, 1977.

74. See *Lee v. Hanley*, 61 Cal. 4th at 1234.

75. See *id.* at 1235.

or her professional obligations in the course of providing professional services, *regardless of how those claims were styled in the plaintiff's complaint.*"<sup>76</sup>

The Court further explained, however, "that the Legislature's primary focus was establishing a new limitations period *for legal malpractice.*"<sup>77</sup> "Thus, while section 340.6(a) applies to claims other than strictly professional negligence claims, it does not apply to claims that do not depend on proof that the attorney violated a *professional obligation.*"<sup>78</sup>

- **A "professional obligation."** The Court said that a "professional obligation" is "an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct."<sup>79</sup>
- **"Professional services."** The Court said that "professional services" are "services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys."<sup>80</sup> This does not include "provision of services *unrelated* to the practice of law, such as concert promotion."<sup>81</sup> But the term "professional services" is not limited to "legal services" — i.e., "services that require a license to practice law."<sup>82</sup> Rather, "professional services" can also include "nonlegal services that are merely incidental to the practice of law," such as "safely keeping and timely returning client funds."<sup>83</sup>
- **A "claim arising from an attorney's performance of services that are *not* 'professional services.'"**<sup>84</sup> The Court made clear that such a claim does *not* constitute "a wrongful act or omission, other than for actual fraud, arising in the performance of professional services ...."<sup>85</sup>

The Commission should **consider the way the Court used the above phrases, and the range of attorney misconduct the Court described, in identifying the type of claim(s) in which its new mediation confidentiality exception would apply.** Of particular note, the Commission should consider whether to borrow any language from Code of Civil Procedure Section 340.6, which refers to an

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76. *Id.* (emphasis added).

77. *Id.* (emphasis added).

78. *Id.* at 1236 (emphasis in original).

79. *Id.* at 1237.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (emphasis added).

85. See *id.*

“action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services.”

In determining the best approach, the Commission **might find it helpful to keep the following points in mind:**

- The Commission has already made clear that its proposed new exception should *not* apply “in a proceeding relating to enforcement of a mediated settlement agreement (e.g., a proceeding to rescind a mediated settlement agreement or a proceeding to enforce such an agreement).”<sup>86</sup> As the accompanying Comment in the discussion draft would explain, “[t]hat restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.”
- It is already possible to hold an attorney (and anyone else) accountable for criminal conduct in the context of a mediation. California’s mediation confidentiality protections do not apply in a criminal case,<sup>87</sup> and they do not cover conduct (unless it is intended as an assertion).<sup>88</sup> There is thus *no need to address criminal conduct* in the Commission’s proposed new exception.
- It may be useful to *focus on what is necessary to achieve the Commission’s policy objectives*. Based on the Commission’s discussions thus far, its chief objectives in proposing the new exception appear to be: (1) protecting the public from attorney malfeasance in the mediation context, (2) holding attorneys accountable for such malfeasance, and (3) making it possible for a client to obtain compensation for damages caused by such malfeasance.

For those purposes, perhaps all that is necessary is for the new exception to apply in a State Bar disciplinary proceeding and a “cause of action for damages against [a] lawyer based upon alleged malpractice” (the phrase used in proposed Section 1120.5(a)(2)(B) of the discussion draft). As the accompanying Comment would point out, (1) a State Bar disciplinary proceeding would be a means of “protecting the public from attorney malfeasance,” and (2) a legal malpractice claim would “further promot[e] attorney accountability and provid[e] a means of compensating a client for damages from breach of an attorney’s professional duties in the mediation context.” Given those effects, is there any reason to make the exception apply in any other cause of action?

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86. Minutes (Oct. 2015), p. 5.

87. See Evid. Code §§ 703.5, 1115-1128.

88. See, e.g., *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*, 26 Cal. 4th 1, 18, n.14, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001); *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010); *Campagnone v. Enjoyable Pools & Spas Service & Repairs*, 163 Cal. App. 4th 566, 571, 77 Cal. Rptr. 3d 551 (2008).

- Two possible reasons are *judicial economy* and *the potential for inconsistent judgments*. In general, it is most expedient, inexpensive, and efficient for courts and litigants to try all related claims together, in a single proceeding. If key evidence were admissible with respect to one claim but not with respect to another claim based on the same core facts, it might be necessary to sever the claims and try them separately. That may be costly. In addition, the differing admissibility rules may lead to inconsistent judgments.

Importantly, however, the new exception would already differentiate between types of claims, applying to some of them (State Bar disciplinary proceedings and legal malpractice claims) but not to others (claims relating to enforcement of mediated settlement agreements). As a result, *some joinder issues and concerns about inconsistent judgments are unavoidable*. The question is how to minimize such problems while also achieving the Commission's objectives and avoiding negative effects.

**It would be helpful to hear comments on precisely what should fall within the ambit of "legal malpractice" for purposes of the Commission's proposal, and what statutory language it should use to implement the optimal approach.**

#### *Attorney-Client Fee Disputes*

Another unresolved issue is whether the proposed new exception to mediation confidentiality should apply in a dispute relating to an attorney-client fee agreement.<sup>89</sup> This issue is similar to the preceding one and overlaps with it in some respects.

For instance, the California Supreme Court explained in *Lee v. Hanley* that an "ordinary fee dispute" would fall within the scope of Section 340.6 (i.e., it would be "a wrongful act or omission, other than for actual fraud, arising in the performance of professional services") *as long as* "the claim's underlying basis consists of evidence that the attorney provided deficient professional services."<sup>90</sup> In other words, *some but not all attorney-client fee disputes are legal malpractice claims*, at least within the meaning of the provision commonly referred to as the statute of limitations for legal malpractice. That might be an important consideration for present purposes.

It is also important to bear in mind that an attorney-client fee dispute might result in a claim brought by an attorney, not just a claim brought by a client. There are some circumstances in which mediation confidentiality might interfere

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89. See Minutes (Oct. 2015), p. 5; Memorandum 2015-45, pp. 23-25.

90. See *Lee v. Hanley*, 61 Cal. 4th at 1239.

with *an attorney's* ability to collect amounts due from a client.<sup>91</sup> There are also circumstances in which mediation confidentiality might preclude *a client* from introducing key evidence in an attorney-client fee dispute.<sup>92</sup> Both situations may be of concern to the Commission, but there are possible grounds for distinguishing between them:

- (1) One could argue that clients need a mediation confidentiality exception for a fee dispute but attorneys do not, because clients are usually unfamiliar with mediation confidentiality while attorneys know more about it and can take steps to protect themselves.
- (2) One could say that in assigning this study, the Legislature was primarily concerned about protecting clients from inept or unethical attorneys and thus the proposed new exception should focus solely on that objective.

How the Commission resolves the issues relating to “legal malpractice” (discussed above) might shed light on how to handle claims involving attorney-client fee disputes. The staff therefore suggests that the Commission **resolve the “legal malpractice” issues first, and then have the staff provide additional analysis regarding attorney-client fee disputes, as appears appropriate.** In making that suggestion, the staff wants to make clear that **comments on the proper treatment of attorney-client fee disputes would be much-appreciated at any time.**

### **Possible Limitations on the Scope of the Exception**

Since the Commission decided to tentatively propose a new mediation confidentiality exception, it has received much input opposing that concept, as well as some supportive comments. In addition, the Commission has received some comments urging it to make the exception inapplicable to a certain category of mediations. These include comments urging it to make the exception inapplicable to:

- (1) Community-based mediation programs funded under the Dispute Resolution Programs Act.

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91. See, e.g., Memorandum 2015-24, pp. 1-2 & Exhibit p. 1 (comments of attorney Perry Smith, discussing intersection of mediation confidentiality and contingent fee agreement designed to protect attorney where client refuses substantial settlement offer obtained through attorney's efforts and subsequently terminates attorney and settles case for approximately the amount previously refused).

92. See, e.g., Second Supplement to Memorandum 2013-47, Exhibit pp. 8-9 (comments of attorney Jerome Sapiro, discussing scenario in which attorney induces client to enter into mediated settlement by orally promising to reduce fee, but later reneges and invokes mediation confidentiality to bar proof of unfulfilled promise).

(2) Family law mediations.

We discuss those possible limitations on the scope of the exception in order below.

Before doing so, it is worth noting that the Public Employment Relations Board (“PERB”) submitted written and oral input urging the Commission “to consider the unique and important role that [PERB] mediators play in resolving the state’s labor disputes, and the damage that may ensue if mediator confidentiality is eliminated or diminished.”<sup>93</sup> PERB’s concerns primarily focused on mediator testimony,<sup>94</sup> and presumably were alleviated, at least to some extent, by the Commission’s decision to leave the provision on mediator testimony (Evidence Code Section 703.5) unchanged. Whether PERB would now ask to be exempted from proposed Section 1120.5 in the discussion draft is not entirely clear to us, despite queries along these lines at the Commission meeting in October 2015. **We invite PERB to clarify its position on this point and submit supportive material if it is requesting an exemption.**

*Community-Based Mediation Programs Funded Under the Dispute Resolution Programs Act*

Mary Culbert is a clinical professor at Loyola Law School, director of the Loyola Law School Center for Conflict Resolution, former director of the Disability Mediation Center, and a longtime volunteer in the LA County Bar Association’s Community-Based Mediation Program.<sup>95</sup> She recently wrote to follow-up on testimony she gave to the Commission at its July meeting, in which she stressed “the negative impact that a mediation confidentiality exception would have on Community-Based Mediation Programs funded under the California Dispute Resolution Programs Act (DRPA), their volunteers and the people they serve, who are primarily indigent.”<sup>96</sup> She has “had the opportunity to work or volunteer in a DRPA-Funded Community-Based Mediation Program for over 23 years.”<sup>97</sup> In that capacity, she has “personally mediated or conciliated thousands of disputes involving indigent people ....”<sup>98</sup> She “respectfully request[s] that any possible confidentiality exception that the Commission might

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93. Third Supplement to Memorandum 2015-46, Exhibit p. 9.

94. See Third Supplement to Memorandum 2015-46, Exhibit pp. 7-9.

95. Exhibit p. 11.

96. *Id.*

97. *Id.*

98. *Id.*

adopt *not apply* to any mediations (or the people involved in them) that are provided by DRPA-Funded Community-Based Mediation Programs.”<sup>99</sup>

Ms. Culbert is not referring to, or advocating on behalf of, DRPA-funded *court*-based mediation programs. She is “solely speaking about” DRPA-funded *community*-based mediation programs.<sup>100</sup>

She reports that “Los Angeles County alone serves around 20,000 people each year in its DRPA-Funded Community-Based Mediation Programs ....”<sup>101</sup> Extrapolating from that figure, she estimates that DRPA-funded mediation programs throughout the state serve a total of approximately 100,000 people each year.<sup>102</sup>

She points out that this is “beneficial for our over-burdened court system, which by and large values the mediation services of DRPA-Funded Community-Based Mediation Programs to assist with its burgeoning caseload.”<sup>103</sup> As a result of those programs, “[m]any thousands of cases never find their way to the court system,” while “[o]thers are diverted out of the court system to Community-Based Mediation Programs ....”<sup>104</sup>

Prof. Culbert further explains that the “vast majority of people who seek out community mediation services are minorities, persons of color, seniors, persons with disabilities, and veterans.”<sup>105</sup> In her experience, they typically “face a wide variety of barriers (language, financial, legal, attitudinal, and physical, to name a few) to full participation in society, to legal services, and to full access to the justice system.”<sup>106</sup> According to her, many people select a DRPA-funded community-based mediation program “as the venue of choice for resolving their disputes because *they do not wish to become involved in the traditional justice system.*”<sup>107</sup>

She warns that “DRPA programs will ... *lose the trust of those we serve*, who come to us to avoid court altogether, when they learn that using our services could cause them to become embroiled in a lawsuit about the process, or about the conduct of the professionals involved in the process.”<sup>108</sup> She implicitly

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99. *Id.* (emphasis added).

100. *Id.*

101. Exhibit p. 12.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Exhibit p. 11.

107. *Id.* (emphasis added).

108. Exhibit p. 13 (emphasis added).

acknowledges that the Commission's proposed new exception focuses on attorney misconduct and would only affect disputes involving an attorney. She explains, however, that the potential negative effect is nonetheless significant:

[P]erhaps as many as ¼ of all cases in any given year may have an attorney involved, based on [an LA program's] statistics. If an exception to mediation confidentiality applies to DRPA-Funded Community-Based Mediation Programs, we could be looking at 25,000 plus cases per year statewide, where DRPA staff, volunteers, and non-represented parties who went to the DRPA program to avoid the court system altogether, could get drawn into a court battle about attorney malpractice. This percentage could be higher in other jurisdictions.<sup>109</sup>

According to Prof. Culbert, the Commission's proposed new exception could not only deter disenfranchised individuals from using DRPA-funded community-based mediation programs, but could also deter persons from volunteering to staff those programs. She writes:

To have the exception apply to ... cases where there is an attorney involved in the process could cause programs and volunteers to refuse to mediate when attorneys are involved. This will greatly impact the indigent person who wants to come to the community mediation program, but may not be able to find service because there is an attorney involved in the case on the other side.<sup>110</sup>

She further explains that

“subjecting mediators to subpoena disrupts the delivery of services and is particularly detrimental to community mediation programs because of their shoe-string budgets and reliance on volunteer mediators.... [T]he costly, time-consuming and anxiety-provoking activity of fighting off subpoenas, for organizations with limited funding, could significantly impact the availability of volunteers to staff these community mediation programs.”<sup>111</sup>

In expressing her concern about a potential decrease in the number of volunteer mediators, it is not clear whether Prof. Culbert is aware that the Commission's proposal would leave Evidence Code Section 703.5 intact.<sup>112</sup> As under existing law, that provision would generally protect a mediator from having to testify about a mediation in a subsequent civil proceeding. It is subject

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109. Exhibit pp. 13-14.

110. Exhibit p. 13.

111. *Id.* (quoting amicus letter written by Prof. Culbert as Vice-President of Southern California Mediation Association in 1996).

112. See Minutes (Oct. 2015), p. 6.

to some exceptions, however, including one for a statement or conduct that could “be the subject of investigation by the State Bar.”

Prof. Culbert goes on to point out that DRPA-funded community-based mediation programs already include some protection against the types of problems the Commission is attempting to address:

We have already built safeguards in to our mediation process when legal action is required. While some cases necessarily require legal action, such as a divorce, the vast majority of cases we handle do not require legal action. In our divorce cases, we require the parties to take their divorce settlement agreement to a notary for signature, post-mediation, before it becomes a non-confidential, enforceable agreement under California Evidence Code Section 1123. This safeguard works .... The parties get time to think about their agreement.<sup>113</sup>

Prof. Culbert closes by stressing that “[b]eing an alternative to the court system is at the heart and soul of DRPA-Funded Community-Based Mediation Program Services, and also why they are an attractive option to so many.”<sup>114</sup> She requests:

These DRPA-Funded Community-Based Mediation Programs provide undeniable benefits to many thousands of indigent people who cannot find help elsewhere, all while surviving on scant financial resources, stretched by dedicated staff and volunteers. Please don’t let any possible mediation confidentiality exception apply to these DRPA-Funded Community-Based Mediation Programs.

Prof. Culbert thus urges the Commission to make its proposed new exception inapplicable to “[a]ll DRPA-Funded Community-Based Mediation Programs, their staff and volunteers, and all those who utilize their services.”<sup>115</sup> The Commission could implement that concept by adding a provision along the following lines to proposed Section 1120.5 in the discussion draft:

This section does not apply to a community-based mediation or mediation consultation funded under the Dispute Resolution Programs Act, Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code.

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113. Exhibit p. 14.

114. *Id.*

115. *Id.*

**Is the Commission interested in this general concept? If so, would it like to (1) revise proposed Section 1120.5 as described above, and (2) make conforming revisions in the accompanying Comment?**

*Family Law Mediations*

The Commission has received considerable input from persons who believe that mediation confidentiality is especially important, and must be most vigilantly protected, in the family law context.<sup>116</sup> While many of these sources oppose the Commission's proposed new mediation confidentiality exception outright,<sup>117</sup> there has also been some talk of making the exception inapplicable to a family law mediation.<sup>118</sup>

Because the Commission has already heard much impassioned testimony and read many comments on the need for mediation confidentiality in the family law context, it does not seem necessary to go into much depth here. The following comments are illustrative:

*From Collaborative Practice California:*

Removing the right to confidentiality is a radical step that we view as an existential threat to an alternative dispute resolution process in family law matters.

Family law matters hold a special place in jurisprudence in that traditional adversarial litigation is clearly harmful to families and children. Confidentiality as described in California Evidence Code

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116. See, e.g., Memorandum 2015-46, Exhibit p. 19 (comments of ML Bishow); Memorandum 2015-46, Exhibit pp. 45-46 (comments of Bill Eddy); Memorandum 2015-46, Exhibit p. 51 (comments of Therese Fey); Memorandum 2015-46, Exhibit pp. 80-81 (comments of Vivian Holly); Memorandum 2015-46, Exhibit p. 124 (comments of Leslee Newman); Memorandum 2015-46, Exhibit p. 125 (comments of Trish Nugent); Memorandum 2015-46, Exhibit pp. 166-67 (comments of Shawn Skillin); First Supplement to Memorandum 2015-46, Exhibit p. 15 (comments of Win Heiskala); First Supplement to Memorandum 2015-46, Exhibit p. 17 (comments of Elizabeth Jones); First Supplement to Memorandum 2015-46, Exhibit p. 39 (comments of Jennifer Webb); Memorandum 2015-54, Exhibit p. 5 (comments of Angela Bissada); Memorandum 2015-54, Exhibit p. 17 (comments of Barry Davis); Memorandum 2015-54, Exhibit p. 26 (comments of Gloria Flores-Cerul); Memorandum 2015-54, Exhibit p. 42 (comments of Harold Stanton); Memorandum 2015-54, Exhibit p. 47 (comments of Gayle Tamler); First Supplement to Memorandum 2015-54, Exhibit pp. 1-3 (comments of Family Law Attorney Mediators Engaged in Study ("FLAMES")); First Supplement to Memorandum 2015-54, Exhibit pp. 9, 10, 11-14 (comments of Hon. Keith Clemens (ret.)); First Supplement to Memorandum 2015-54, Exhibit pp. 21-22 (comments of Frederick Glassman); Second Supplement to Memorandum 2015-54, Exhibit pp. 6-7 (comments of David Luboff); Second Supplement to Memorandum 2015-54, Exhibit p. 8 (comments of Dvorah Markman); Third Supplement to Memorandum 2015-54, Exhibit pp. 19-21 (testimony of Fern Topas Salka on behalf of FLAMES); First Supplement to Memorandum 2016-30, Exhibit p. 5 (comments of Penny St. John).

117. See, e.g., First Supplement to Memorandum 2015-46, Exhibit p. 7 (comments of Hon. Susan Finlay (ret.)).

118. See, e.g., Memorandum 2016-30, Exhibit pp. 10-14 (comments of Frederick Glassman & Fern Topas Salka); Memorandum 2016-30, Exhibit pp. 17-18 (comments of Lynette Berg Robe).

Sections 1115-1128 has provided a safe forum for parties in family law cases to speak frankly and freely. Removing this protection will drive skilled mediators to abandon the practice of mediation and will leave parties without a forum for non-adversarial processes. This will expose families and children to unnecessary and harmful acrimony and crippling costs of litigation.<sup>119</sup>

*From Hon. Susan Finlay (ret.):*

As a bench officer for 32 years, I can affirm the value of the mediation process for litigants and particularly for families going through a dissolution. After leaving the bench, I became involved in mediation in order to help parties stay out of court, which I know to be a harmful, toxic experience for the majority of litigants.

Yes, there are a few cases of attorney malpractice; the Commission's desire to protect these victimized consumers is understandable. The result, however, will in turn victimize all of those thousands of parties who participate in mediation each year, with the assurance of knowing that their negotiations are confidential .... For the Commission to recommend removing this safeguard for mediating parties is to penalize the vast majority for the malpractice of a few.

....

Mediation has been particularly helpful to divorcing parents since it enables them to preserve their co-parent relationship which benefits the children. If they do not have this option, then they are forced to litigate which destroys families, seriously damaging the children in the process.<sup>120</sup>

*From Hon. Isabel Cohen (ret.):*

It is the nature of the beast that settlement of family law cases requires compromise, and that the comparative rationality of the parties, their circumstances and their motivation dictate the results of mediation, including the payment of a premium where necessary to avoid litigation. It is no secret that most parties are unhappy with settlement results, that most parties in family law matters are generally not happy, and that mediation enables the courts, staggering under their present budget shortfalls (of roughly one third of prior budgets in L.A.), to process their remaining caseloads. It is well known that family lawyers are more likely to be sued in unmeritorious malpractice actions than other lawyers because they have the unhappiest clients, many of whose lives take a nosedive on dissolution of marriage, through no fault of the lawyer.

An exception to mediation confidentiality for attorney malpractice, as my colleague from San Diego, Judge Susan Finlay, warned, will end mediation as we know it.

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119. Memorandum 2015-54, Exhibit p. 3.

120. First Supplement to Memorandum 2015-46, Exhibit p. 7.

Without the candor resulting from confidentiality the attainment of meaningful settlements will not survive. Attorneys will hazard their opinions at their peril, for all too often the unhappy party to a settlement will suffer buyer's remorse, the occupational hazard of most parties to settlement, because they walk away with a half loaf when sometimes they could have won more in trial.

The advantages of even a bad settlement ... are to the court, to the parties who avoid wear and tear on the organism, to the budget (as trial will commonly cost the price of a college education for middle class families), and most importantly, to the emotional lives of children, which most recent studies now show are wrecked by the conflict between the parents, and not by the shared parenting plans. The implications to the emotional health of children are to their developmental milestones, including their maturation and childhood and adult coping skills.<sup>121</sup>

*From Hon. Gretchen Taylor (ret.):*

I am a Certified specialist in Family Law, a divorce lawyer for 18 years, a former bench officer with 12 years of service in Superior Court Family Law in Riverside and Los Angeles counties, and a full time mediator and neutral in Family Law since my retirement from the bench in 2009.

The subject matter and the emotional volatility of this area of the law burdens courts with intractable cases fueled by jealousy, revenge and power imbalances. The lives of children and many weaker spouses get little attention as the calendars are overwhelming and impossible to meet with dignity and full consideration.

....

The only light in my field is the safe place for these broken families, and many times their desperate attorneys who are not being paid, to end the ordeal [in] a full day of mediation where all sides get to vent and be heard....

....

Attorneys in my field are bombarded with spurious malpractice claims to offset their request to be paid the balance of the fees owed them at the end of the case. Their malpractice premiums are already the highest of any field. Due to the nature of ending intimate relationships, a scapegoat is often the lawyer.

Making any exception to the mediation privilege will topple an already delicate and difficult process....

Please consider the danger of opening a crack in the wall of protection that surrounds mediation. It is not worth it to allow litigation over unhappy decisions that surely will follow."<sup>122</sup>

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121. First Supplement to Memorandum 2015-54, Exhibit pp. 16-17.

122. First Supplement to Memorandum 2015-46, Exhibit pp. 36-37; see also Third Supplement to Memorandum 2015-54, Exhibit pp. 22-27.

*From Margaret Tillinghast:*

As a Certified Family Law Specialist, with 25 years of experience, I have come to realize what a valuable tool CONFIDENTIAL MEDIATION is for a majority of my clients.

It affords the clients an opportunity to work out the plan for dissolution of their marriage and care of their children in a private setting, without the worry that what is said will become part of a public record. The folks who choose the CONFIDENTIAL MEDIATION route are folks who value their privacy, who are thoughtful about their children, choosing NOT TO USE THEIR PRECIOUS CHILDREN as pawns, as so often is the case in the litigation setting.

....  
Do not destroy this valuable tool that is used in helping wise families find a peaceful means to resolve their issues.<sup>123</sup>

In light of concerns like the ones expressed in the above comments, **does the Commission want to make its proposed new exception inapplicable to family law mediations?** If so, the Commission could implement that concept by adding a provision along the following lines to proposed Section 1120.5 in the discussion draft:

This section does not apply to an action or proceeding under the Family Code.

**Would the Commission like to (1) revise proposed Section 1120.5 as described above, and (2) make conforming revisions in the accompanying Comment?**

#### **Instructions to Litigants or Other Special Rules**

In the discussion draft, subdivision (a) of proposed Section 1120.5 would create the proposed new exception to mediation confidentiality, which is designed to promote attorney accountability in the mediation context. Subdivision (b) would implement the Commission's decision to "include a provision similar to Uniform Mediation Act Section 6(d),"<sup>124</sup> which limits the extent of disclosure of mediation communications. Subdivision (b) and the corresponding Comment would provide:

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not

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123. Memorandum 2015-46, Exhibit p. 181.

124. Memorandum 2015-46, Exhibit p. 181.

render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

....

**Comment. ...**

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act.

....

Subdivision (b) thus seeks to prevent wholesale disclosure of mediation communications and writings: A litigant may only use the portion of a mediation communication or writing that is *necessary* to allow consideration of evidence that satisfies the admissibility or disclosure standard of subdivision (a), and the litigant may only use that portion for *that specific purpose*.

In theory, that restriction should safeguard against disclosure of sensitive mediation communications that are entirely unrelated to an allegation that an attorney engaged in misconduct while representing a client in a mediation. Such mediation communications could be wide-ranging in character. They might include, for instance, an opponent's admission of adultery, a client's harsh criticism of his supervisor, an expert's description of a trade secret, or the like.

In practice, it seems likely that courts will take notice of subdivision (b) and try to abide by it in making rulings on the admissibility and disclosure of mediation evidence pursuant to proposed Section 1120.5(a). It is perhaps less clear that litigants, particularly self-represented litigants, will do so.

A litigant might be unaware of the restrictions in subdivision (b), might be careless about adhering to those restrictions, might be unsure what to do, or might have improper motives and exploit an attorney misconduct claim as a pretext for spilling sensitive information from a mediation. The danger of an improper disclosure may be especially acute in the early stages of a case, before a judge becomes involved and has an opportunity to educate the parties.

If a sensitive mediation communication or writing were improperly disclosed in violation of subdivision (b), the impact could be devastating and irreversible. It may be impossible to "unring the bell."

The Commission might thus want to **consider whether it would be possible to take any steps to prevent such improper disclosures of mediation communications and writings**. Perhaps, for instance, the Judicial Council could develop a civil cover sheet that asks whether a complaint or a cross-complaint includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation. If the

answer to that question is “yes,” the plaintiff or the cross-complainant could be required to complete and submit an additional form, which provides information on mediation confidentiality in plain English and a signature block for acknowledging receipt of that information. Similar requirements could apply with respect to the response to such a complaint or cross-complaint.

Alternatively, perhaps there could be a special jurat requirement for a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation. The person submitting the document would have to attest to reading a certain publication about mediation confidentiality, watching a short informational video on the subject, or the like.

There are many other possibilities. If the Commission is interested in this general concept, perhaps the best way of addressing it would be to entrust the implementation details to the Judicial Council, which has expertise in the development of court forms, procedural rules, and informational materials relating to the court system. **That could be done by adding a provision like the following to proposed Section 1120.5 in the discussion draft:**

The Judicial Council shall study means of preventing improper disclosure of mediation communications and writings in adjudicating a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation. On or before [date], the Judicial Council shall develop one or more means of promoting this objective, which may include, without limitation, forms, rules, instructions, or educational materials.

Improper disclosure of mediation communications and writings is perhaps less of a concern in a State Bar disciplinary proceeding, because such a proceeding is generally confidential until formal charges are filed against an attorney in the State Bar Court.<sup>125</sup> **It would, however, be possible to address this context as well, perhaps by adding a provision like the following to proposed Section 1120.5:**

The State Bar shall study means of preventing improper disclosure of mediation communications and writings in resolving a complaint against a lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act, that is based on an alleged breach of a professional

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125. See Memorandum 2015-22, pp. 44-45.

requirement when representing a client in the context of a mediation or a mediation consultation. On or before [date], the State Bar shall develop one or more means of promoting this objective, which may include, without limitation, forms, rules, instructions, or educational materials.

Another possible approach to prevent improper disclosures would be to **ensure that all mediation participants are promptly informed regarding the commencement of a legal malpractice case in which mediation communications might be disclosed pursuant to proposed Section 1120.5.**<sup>126</sup> That would afford an opportunity for mediation participants who would not otherwise be involved in the malpractice case to take steps to prevent improper disclosure of mediation communications and writings of consequence to them. For instance, such a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

Such an approach could be implemented in a number of different ways. The most obvious would be add a provision like the following to proposed Section 1120.5:

Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose addresses are reasonably ascertainable.

**Is the Commission interested in this general concept? If so, how would it like to implement the idea? Should the concept also be implemented in a State Bar disciplinary proceeding?** Suggestions and other comments on these matters would be helpful.

### **Data Collection and Evaluation**

In a memorandum for the Commission's June meeting, the staff raised the possibility of requiring the State Bar to collect some data if the Commission's proposed new mediation confidentiality exception were enacted:

[I]n drafting its tentative recommendation in this study, the Commission should consider whether the proposed law should

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126. See generally Minutes (June 2016), p. 5 ("Among other things to consider, the staff should explore the possibility of providing notice to all mediation participants whose communications might be disclosed as the case progresses.").

require the State Bar to collect certain data upon enactment of the new mediation confidentiality exception under discussion. For instance, the Commission could propose that upon the operative date of the proposed new exception, the State Bar must begin collecting data on instances of alleged mediation-related attorney misconduct and the fate of those allegations. The Commission could further propose that the State Bar must present that data (perhaps in anonymized format) by a particular date, for further evaluation by the Legislature or other entity.<sup>127</sup>

The goal would be to obtain data on the impact of the new exception, and use that data in analyzing whether the exception is functioning well, requires some refinement, or is incurably problematic.

The Commission discussed the concept and expressed interest in further exploring it.<sup>128</sup> **One way to learn more about the possibility would be to include a data collection requirement in the tentative recommendation,** perhaps by adding provisions like the following to proposed Section 1120.5 in the discussion draft:

(e) Commencing on [date], the State Bar shall collect data on all of the following:

(1) The number of complaints under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act, in which the complainant alleges that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The outcomes of those complaints.

(3) Whether, and to what extent, evidence of mediation communications or writings was admitted or disclosed pursuant to Section 1120.5 of the Evidence Code in the process of resolving those complaints.

(f) On or before [date], the State Bar shall provide the data collected pursuant to subdivision (e), during the period from [date] to and including [date], to the Legislature in anonymized format. The State Bar shall continue to collect data pursuant to subdivision (e) afterwards and shall provide that additional data to the Legislature in anonymized format upon request.

If the Commission is interested, **it could also include a similar data collection requirement directed to the Judicial Council and the superior courts,** which would pertain to complaints and cross-complaints that include a cause of action

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127. Memorandum 2016-37, p. 6.

128. See Minutes (June 2016), p. 4.

for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation.

**Would the Commission like to include any provisions like these in its tentative recommendation? If so, what specifically would it like to do?** In considering the options, the Commission should **take into account the potential costs of collecting and analyzing such data.**

The staff welcomes and encourages suggestions or comments on this matter, or on any other aspect of the Commission's study. The Commission much appreciates the time and effort that stakeholders and other interested persons put into sharing their thoughts on issues before the Commission.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

**EMAIL FROM LEE BLACKMAN  
(10/28/16)**

**Re: Mediation Confidentiality**

Ms. Gaal-

I understand that the CLRC staff will be preparing a memorandum discussing additional reforms to be considered as compliments or alternatives to the proposed new mediation confidentiality exception tentatively adopted by the Commission.

As you and the staff prepare that memorandum, would you please consider a provision or comment that would limit the scope of the new exception so that only those mediation communications “that are ‘necessary to the determination’ of the client’s claim of lawyer malpractice or other misconduct” may become discoverable and admissible. Other mediation communications should continue to be protected from disclosure.

As discussed below, this proposed limitation on the scope of the proposed exception to mediation confidentiality is consistent with the scope of permitted disclosure of client confidential information in legal malpractice cases that are unrelated to mediation proceedings. This proposed limitation is also important because it makes clear that the exception does not dictate an overbroad abrogation of the right of privacy embedded in Article 1, Section 1, of the California Constitution simply because lawyer misconduct in the mediation setting is alleged. Adoption of the proposed limitation will also mitigate some of the potential for abuse of the exception by frustrated litigants, mediation participants seeking negotiating leverage, or lawyers who might attempt to discourage potential claimants by threatening disclosure of embarrassing or sensitive private matters.

The most relevant corollary to the exception to mediation confidentiality being considered by the Commission is the general exception to the attorney-client privilege that allows disclosure of client confidences where they are relevant to a dispute arising from a lawyer-client relationship. In this regard, California Evidence Code Section 958 states:

There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

While this exception might appear broad, the scope of the exception has consistently been interpreted by Courts and lawyer discipl[in]e agencies to be narrow and tailored to accomplish its purpose with minimal interference with the objectives of the attorney-client privilege (candor in the attorney-client relationship). In examining a lawyer’s right to disclose confidential information in response to a client claim of lawyer misconduct, the Bar Association of San Francisco, in Ethics Opinion 2014-1 (copy attached), summarized the law this way:

Even where the self-defense exception [Evidence Code Section 958] applies and a response [disclosure of confidential information] is

reasonably necessary to establish a defense or claim on behalf of the attorney, the disclosure of any confidential information must be narrowly tailored to respond to the specific issues raised by the former client. In such situations, disclosure is therefore limited to relevant communications between the client and the attorney whose services gave rise to the breach of duty claim. *See Schlumberger Ltd. [v. Sup.Ct. (Kindel & Anderson)* (1981) 115 Cal.App.3d 386], *supra*, 115 Cal.App.3d at 392; Los Angeles Bar Ass'n Form.Opn. 452 (1988) (on collecting a fee or defending against a malpractice action an attorney may disclose both confidential information and client secrets, but only to the extent necessary to the action") [sic]; *In re Rindlisbacher* (9th Cir. BP 1998) 225 B.R. 180, 183 (exception did not permit attorney to disclose in discharge proceeding client's admission that he had lied at dissolution trial; the attorney's disclosure was not relevant to the attorney's protection of his own rights against a breach of a duty by the debtor); *see also* Los Angeles Bar Ass'n Form.Opn. 519 (2007) (disclosure under section 958 must comply with the "relevancy" requirement of the section and the ethical directive that an attorney's disclosure pursuant to the exception be limited to the necessities of the case and its issues). [At pp. 6-7.]

In electing to pursue a malpractice claim against a lawyer, the client does not consent to broad disclosure of confidential information merely because it may be tangentially related to the dispute. And the bringing of a malpractice claim against a lawyer does not permit the unnecessary use, or abuse, of confidential information by the client. Nor may a lawyer use a threat to disclose peripheral confidential information as a means to discourage a client from pursuing a malpractice claim.

These same principles should apply to an exception to mediation confidentiality where the objective is to enforce lawyer accountability and provide judicial access to clients with malpractice claims that arise out of a mediation. Indeed, if the Commission seeks to encourage lawyer accountability by creating this exception, it should be careful not to effectively bar access to the courthouse by discouraging mediation participants from pursuing malpractice claims because of their fear that they will be opening their most private affairs to public scrutiny. The Commission's goals can be fully accomplished by limiting the scope of the exception to "directly relevant mediation communications" and by recognizing that abuse of the exception should open the abuser to appropriate sanctions, just as a lawyer's decision to reveal client confidences not directly relevant to the determination of a malpractice claim is appropriately treated as a breach of duty.

Thank you for your consideration of this suggestion.

Lee L. Blackman<sup>\*/</sup>

<sup>\*/</sup> Private and Pro Bono Mediator; Board Member, Southern California Mediation Association; Vice-Chair, Los Angeles County Bar Association Attorney Client Mediation and Arbitration Service; recipient in 2015 of The Honorable Benjamin Aranda III Outstanding Public Service Award for service to the Los Angeles County Bar Association Civic Mediation Project.)



## **OPINION 2014-1**

[Issue date: January 2014]

### **ISSUE:**

May an attorney respond to a negative online review by a former client alleging incompetence but not disclosing any confidential information where the former client's matter has concluded? If so, may the attorney reveal confidential information in providing such a response? Does the analysis change if the former client's matter has not concluded?

### **DIGEST:**

An attorney is not ethically barred from responding generally to an online review by a former client where the former client's matter has concluded. However, the duty of confidentiality prevents the attorney from disclosing confidential information about the prior representation absent the former client's informed consent or waiver of confidentiality. This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege.<sup>[1]</sup> While the online review could have an impact on the attorney's reputation, absent a consent or waiver, disclosure of otherwise confidential information is not ethically permitted in California unless there is a formal complaint by the client, or an inquiry from a disciplinary authority based on a complaint by the client. Even in situations where disclosure is permitted, disclosure should occur only in the context of the formal proceeding or inquiry, and should be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, depending on the circumstances, it may be inappropriate for the attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

### **AUTHORITIES INTERPRETED:**

Business & Professions Code §6068(e); Rules of Professional Conduct, Rule 3-100; Evidence Code §§955, 958; ABA Model Rules, Rule 1.6.

### **STATEMENT OF FACTS**

A former client has posted a review on a free public online forum that rates attorneys. The review does not disclose any confidential information but is negative and contains a discussion in which the former client makes general statements that Attorney mismanaged the client's case, did not communicate appropriately with the former client, provided sub-standard advice and was incompetent. Attorney wishes to respond to the negative review by posting a reply in the electronic forum; and, if permitted, discuss the details of Attorney's management of the case, the frequency and content of communications Attorney had with the former client and the advice Attorney provided to the former client and why Attorney believes the advice was appropriate under the circumstances.

### **DISCUSSION [2]**

#### **A. Duty of Loyalty**

As fiduciaries, attorneys owe a duty of loyalty to their clients. *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289. After conclusion of the attorney-client relationship, an attorney continues to owe a residual duty of loyalty to a former client, which is narrow in scope. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (the duty of loyalty continues after termination of the attorney-client relationship to the extent that a lawyer may not act in a manner that will injure the former client with respect to the matter involved in the prior representation); see also *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574 ("[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former

client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.").

If the matter Attorney previously handled has concluded, responding to the former client's review through statements that do not disclose any confidential information would not typically constitute a breach of loyalty, even though Attorney's response might be deemed "adverse" to the former client. Simply responding to the review and denying the veracity or merit of the former client's assertions (without disclosing confidential information) would not be likely to injure the former client with respect to any work Attorney previously did, or to undermine such work. Attorney would not be attacking his or her prior work. To the contrary, Attorney would be supporting the merit of such work.

If, on the other hand, the matter Attorney previously handled has *not* concluded, a response, even one that does not involve the disclosure of any confidential information, may be inappropriate. Attorney should conduct a fact specific analysis, taking into consideration: (1) the status and nature of the on-going proceedings, (2) the content of the Attorney's contemplated response, and (3) any negative impact the response could have on the on-going proceedings. The Committee can foresee the possibility that, at least in some situations, a response, even one not containing confidential information, could potentially undermine the attorney's prior work. For example, a statement by Attorney that his management of the case was reasonable given the former client's likelihood of success (while not disclosing confidential facts) could suggest weakness in the former client's position, and could negatively influence the opposing party's willingness to settle or litigation strategy.

## **B. The Duty of Confidentiality**

The scenario presented also implicates Attorney's duty of confidentiality to his former client. "One of the principal obligations which bind an attorney is that of fidelity ... maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client .... This obligation is a very high and stringent one." *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289, quoting *Anderson v. Eaton* (1930) 211 Cal. 113, 116.

In California, the duty of confidentiality is codified in the State Bar Act (Cal. Bus. & Prof. C. §6000 et seq.) and embodied in the California Rules of Professional Conduct ("CRPC"), Rule 3-100. Pursuant to Bus. & Prof.C. §6068(e) an attorney must "maintain inviolate the confidence, and at every peril to himself or herself [] preserve the secrets, of his or her client." See also Rule 3-100(A) ("A member shall not reveal information protected from disclosure by Business & Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.").

Maintaining a client's "confidence" means the lawyer may not do anything to breach the trust reposed in him or her by the client. It is "not confined merely to non communication of facts learned in the course of professional employment; for the section separately imposes the duty to 'preserve the secrets of his client.'" *In re Soale* (1916) 31 Cal. 144, 153; see also Cal. State Bar Form. Opns. 1993-133, 1988-96, 1986-87 & 1981-58. "Secrets" refers to other information gained in the professional relationship the client has requested be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client. Cal. State Bar Form. Opns. 1993-133; Los Angeles Bar Ass'n Form. Opns. 452 (1988). The duty to protect client secrets applies to all information relating to client representation, whatever its source. Los Angeles Bar Ass'n Form.Opn. 436 (1985). It even encompasses matters of public record communicated in confidence that might cause a client or former client public embarrassment. *Matter of Johnson* (Rev.Dept. 2000) 4 Cal. State Bar Ct.Rptr. 179, 189.

"Confidence" also refers to information protected by the attorney-client privilege. See Los Angeles Bar Ass'n Form. Opns. 386 (1980), 466 (1991); Cal. State Bar Form. Opns. 1980-52 & 1976-37. However, the duty of confidentiality prohibits disclosure of a much broader body of information than that protected by the attorney-client privilege. See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *Industrial Indemnity Co. v. Great American Ins. Co.* (1977) 73 Cal.App.3d 529, 536; Cal. State Bar Form. Opns. 2003-161, 1993-133; see also CRPC 3-100, Discussion [2] ("The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy."). Thus, in California, whether information is privileged is not dispositive as to whether it is confidential and whether an attorney may voluntarily disclose such information.

The duty of confidentiality survives the conclusion of the attorney-client relationship. See *Wutchumna, supra*, 216 Cal. 564, 571 ("The relation of attorney and client is one of highest confidence and as to professional information gained while this relation exists, the attorney's lips are forever sealed, and this is true notwithstanding his subsequent discharge by his client."); *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891.

The factual information Attorney would like to disclose is information obtained during the course of the prior representation. It includes details regarding the management of the case, the frequency and content of communications with the former client, and advice provided by Attorney. Such information falls within the definition of a "confidence." It also falls within the definition of "secrets," as the former client would not likely want the information publicly disclosed. The proposed disclosure could be particularly detrimental to the client if the former client's action is ongoing.

Attorney's duty of confidentiality to the former client would therefore apply to all information Attorney possesses by virtue of the former representation including, but not limited to, privileged attorney-client communications and attorney work product. Absent consent of the former client, waiver or an exception to the duty of confidentiality and/or attorney-client privilege, Attorney has an affirmative obligation not to disclose otherwise confidential information,<sup>[3]</sup> and to assert the attorney-client privilege on behalf of the former client. See Ev.C. §955; *Glade v. Sup.Ct. (Russell)* (1978) 76 Cal.App.3d 738, 743. Whether an applicable exception to the duty of confidentiality and/or attorney-client privilege exists is discussed in detail below.

### **C. The Self-Defense Exception**

Whether Attorney may disclose otherwise confidential information turns on whether there is an applicable exception to the duty of confidentiality or attorney-client privilege that would permit such disclosure. Unlike the ABA Model Rules of Professional Conduct, and the numerous jurisdictions that have adopted versions of the ABA Model Rules, California's rules of professional conduct do not have an express exception to the duty of confidentiality that permits a lawyer to disclose otherwise confidential information in disputes with a client or former client. See, e.g., ABA Model Rule 1.6(b)(5) (a lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client"); see also Los Angeles Bar Ass'n Form. Opn. 525 (2012) (absent the client's waiver of confidentiality or privilege, there is no statutory exception to the duty of confidentiality or the attorney-client privilege that would permit an attorney to counter client accusations by disclosing confidential information where no litigation or arbitration is pending between the attorney and former client); Restatement (Third) the Law Governing Lawyers, §64 ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charges by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.").

#### **1. Cal. Evidence Code Section 958**

To the extent there is a "self-defense" exception in California, it is statutory and its scope and application are defined by case law. California Evidence Code §958 provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." California courts have generally applied this exception to situations where a client or former client asserts a legal claim against a lawyer, or the lawyer asserts a fee claim against the former client. See, e.g., *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 228 (action for fees brought by lawyer); *Smith, Smith & Kring v. Sup. Ct. (Oliver)* (1997) 60 Cal.App.4th 573, 580 (malpractice action by client); *Schlumberger Ltd. v. Sup.Ct. (Kindel & Anderson)* (1981) 115 Cal.App.3d 386, 392 (malpractice action by client); see also *Styles v. Mumbert* (2008) 164 Cal.App.4th

1163, 1168 (refusing to apply exception where no malpractice claim or fee dispute existed).

The rationale behind the "exception" is that when a client or attorney claims the other breached a duty arising out of the professional relationship, it would be "unjust" to allow the claimant to invoke the privilege so as to prevent the other from producing evidence in defense of the claim. See Cal. Ev. C. §958, Law Revision Commission Comments; *Glade, supra*, 76 Cal.App.3d at 746.

In this situation, the former client has made assertions in a public forum suggesting Attorney violated his duty of communication, did not competently handle the case and provided services that were below the standard of care. Although the former client alleged Attorney breached professional duties to the former client, a formal legal claim or proceeding has not been brought against Attorney

The rationale supporting the exception arguably has merit even outside the presentation of a formal legal claim or proceeding. It is possible, for example, that the harm to Attorney from the online review could be as damaging to Attorney as a formal claim by the client (which might be refuted, dismissed, etc., on substantive legal grounds). The Committee notes that because Ev.C. §958 relates to the

admissibility of evidence in the context of a legal proceeding, it is doubtful it would have any lawful application outside a formal legal or administrative proceeding.

## **2. Model Rule 1.6**

The Model Rules, which are instructive, especially where the California rules of professional conduct are silent on a matter, suggest disclosure of otherwise confidential information may be appropriate in certain circumstances outside a formal legal proceeding. See, e.g., ABA Model Rule 1.6, Comment [10] (the exception "does not require the lawyer to await commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."). [4]

At least one federal district court in California has adopted the Model Rule's self-defense exception (1.6(b)(5)) based on the premise that the California Rules of Professional Conduct contain no provision specifically governing self-defense and therefore the Model Rules are an "an appropriate standard to guide the conduct of members of its bar." See *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 FRD 687, 690-91 (C.D. Cal. 1988). The *National Mortgage* decision, however, decided whether a self-defense exception existed based on federal common law.

California state courts have rejected the argument that a privilege exception can exist outside the specific parameters of the Evidence Code. See *McDermott, Will & Emery v. Sup. Ct.*, 83 Cal.App.4th 378, 385 (2000) (rejecting privilege exception for shareholder derivative actions: "longstanding California case authority has rejected this application of the federal doctrine, noting it contravenes the strict principles set forth in the Evidence Code of California which precludes any judicially created exceptions to the attorney-client privilege."); Ev. C. §911 ("Except as otherwise provided by statute ... (b) No person has a privilege to refuse to disclose any matter or refuse to produce any writing, object or other thing."). Accordingly, the Committee does not find *In re Nat'l Mortg.* and Model Rule 1.6 dispositive on the issue of whether a disclosure of otherwise confidential information would be permitted in California in a public online forum.

Moreover, comment [10] to Rule 1.6 (even if applicable) implicates a situation in which a "third party" claims an attorney is complicit in the wrongdoing of a client. As explained in detail in Los Angeles Bar Ass'n Form.Opn. 519 (2007), neither California case law nor Ev.C. §958 recognize a self-defense exception for claims made by third parties. Model Rule 1.6(b)(5) is broader than any self-defense exception recognized under California law. Moreover, the comment to Rule 1.6 has been applied only to those situations in which the third party has the authority to take action against the attorney and there is an imminent threat of such action with serious consequences. Here, no third party has made any inquiry, and it is not clear that a formal claim or disciplinary inquiry is imminent.

## **3. Application of Exception to Ineffective Assistance of Counsel Claims**

Section 958 has been held applicable to a criminal defendant's claim of ineffective assistance of counsel in a habeas proceeding: "[a] trial attorney whose competence is assailed by his former client must be able to adequately defend his professional reputation, even if by doing so he relates confidences revealed to him by the client." *In re Gray* (1981) 123 Cal.App.3d 614, 616. This holding tends to support the proposition that Ev.C. §958 could apply outside a formal or direct action between the former client and attorney. However, in *Grey* the claim was still being made by the client in a formal legal proceeding, albeit not a civil or disciplinary proceeding against the attorney himself. Thus, *Grey* is not dispositive as to the issue of whether Ev.C. §958 can be applied outside the context of a formal legal proceeding.

The ABA Standing Committee on Ethics and Professional Responsibility suggests that under Model Rule 1.6(b)(5), disclosure of otherwise confidential information may not be appropriate outside a formal legal proceeding, or an inquiry from a regulatory or disciplinary authority, absent the informed consent of the client. ABA Form. Opn. 10-456. The Committee opines that Comment [10] to Rule 1.6 should be construed narrowly. The Committee addresses whether a former lawyer of a client claiming ineffective assistance of counsel can disclose otherwise confidential information in response to a prosecution request *prior* to a court supervised response by way of testimony or otherwise. The Committee concludes that under Rule 1.6(b)(5), a lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel, but it is highly unlikely that a "non-supervised" disclosure in response to a prosecution request would be justified. ABA Form. Opn. 10-456, p. 1.

The Committee emphasizes:

Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent .... *A client's express or implied waiver of the attorney-client privilege has the legal effect of foregoing the right to bar disclosure of the client's prior confidential information in a judicial or similar proceeding. Standing alone, however, it does not constitute 'informed consent' to the lawyer's voluntary disclosure of client information outside such a proceeding.*

ABA Form. Opn. 10-456, p. 2 (emphasis added).

The Committee approves of disclosure reasonably necessary in advance of an actual proceeding in response to a party who credibly threatens to bring a civil, criminal or disciplinary claim against the lawyer, such as a prosecuting, regulatory or disciplinary authority, to try to persuade the party not to do so. The Committee cautions, however, that although the self-defense exception has broadened over time, it is a limited exception because "it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation." ABA Form. Opn. 10-456, p. 3. Thus, a lawyer may only act in self-defense under the exception to defend against charges that *imminently* threaten the lawyer with *serious* consequences. *Id.*; see also Restatement (Third) of the Law Governing Lawyers §64 cmt. c. A habeas proceeding is not a controversy between the client and lawyer, and the lawyer's disclosure is not necessary to establish a defense to a criminal charge or civil claim against the lawyer. ABA Form. Opn. 10-456, pp. 3-4; see also Model Rule 1.6(b)(5).

The Committee further acknowledges that the language of Rule 1.6(b)(5), permitting disclosure "to respond to allegations in any proceeding concerning the lawyer's representation of the client," permits a lawyer to defend him or herself as reasonably necessary against allegations of misconduct in proceedings "comparable to those involving criminal or civil claims against a lawyer." ABA Form. Opn. 10-456, p. 4. The Committee concludes that a voluntary disclosure to the prosecution outside a court-supervised proceeding would not be reasonably necessary: "It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable." *Id.* Here, although Attorney has an interest in his or her reputation, a disclosure of confidential information is not necessary to establish a claim against the former client or to prevent the imposition of liability or some restriction on the Attorney's conduct.

As the Committee notes, the self-defense exception is tempered by a lawyer's obligation to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements ... to the fullest extent practicable." Model Rule 1.6(b)(5), cmt. 14. That obligation is undermined if the disclosure is made in a public forum where there is no adjudicatory oversight: "[T]here would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers." ABA Form. Opn. 10-456, p. 5. A disclosure by Attorney in the online forum, raises similar concerns.

Here, Attorney's disclosure in a public online forum has no judicial supervision and is accessible to anyone. Although the former client's assertion could impact Attorney's reputation, it is the Committee's opinion that such potential impact, by itself, is not of a nature that reasonably requires Attorney to disclose in a public forum what would otherwise be confidential information. Attorney may seek to mitigate any potential impact from the negative review by submitting a response that generally disagrees with the former client's assertions and notes that Attorney is not at liberty to discuss details regarding confidential client matters unless the information comes within Bus. & Prof. C. §6068(e)(2). This approach strikes an appropriate balance between the rationale for the self-defense exception, the need to limit disclosures to information reasonably necessary to defend the lawyer, and the importance of maintaining a client's confidential information and promoting full and candid disclosure of information by clients to their attorneys.

#### **4. The Restatement Approach**

We believe this conclusion is also commensurate with the approach recommended in the Restatement (Third) of the Law Governing Lawyers. The Restatement looks to the concepts of "necessity" and

"reasonableness" in determining what disclosure may be appropriate. Section 64, comment e, states: Use or disclosure of confidential client information ... is warranted only if and to the extent that the disclosing lawyer reasonably believes it necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy.

Comment c to section 64 states:

A lawyer may act in self defense ... only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification. Imminent threat arises not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant.

Here, although the former client has asserted that Attorney's conduct fell below the standard of care, the former client has not manifested an affirmative intent to bring a formal claim against Attorney. Even if such a claim were directly threatened, a response in the online forum would not be reasonably necessary to establish a defense or claim on behalf of Attorney. Attorney would have the ability to make an appropriate disclosure in the context of the impending legal proceeding. An additional online disclosure would not have any substantive impact on the issue of the lawyer's potential liability in the legal proceeding.

While comment f to section 64 provides that an attorney may, in appropriate circumstances, respond to an informal but "public" accusation, it appears limited to the context of responding to a letter of grievance to a disciplinary authority. In that context, the charge (albeit informal) has been made to a body that clearly has the authority to formalize and prosecute the charge. It is not clear the Restatement would permit disclosure in response to a public accusation that is not made to or before a body with some ability to impose liability or otherwise restrict the attorney's conduct. Notably, comment e of section 64 provides: "[t]he lawyer may divulge confidential client information only to those persons with whom the lawyer must deal in order to obtain exoneration or mitigation of the charges."

##### **5. Application of Exception to Facts Presented**

Here, the assertions against Attorney, albeit general in nature, go beyond casual charges not likely to be taken seriously by others. They have been posted on a forum that is publicly available and dedicated to providing reviews of attorneys. Absent a response from Attorney, it is possible that a party might give the review credence and question Attorney's professional skills, thus impacting his or her potential retention. Notwithstanding this fact, Attorney's proposed response would be in a public forum that has no ability to impose any restriction or liability on Attorney. The Committee does not believe applicable California law permits a lawyer to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver.<sup>[5]</sup>

Disclosure is not, in the Committee's view, reasonably necessary, or sufficiently tailored to establishing a self-defense. The absence of the inclusion of any self-defense exception in California's Rules of Professional Conduct, the longstanding policy in California that precludes judicial exceptions to the attorney-client privilege, and the breadth of California's duty of confidentiality (which goes beyond the evidentiary privilege) is further support for the conclusion that Ev.C. § 958 would not apply under the facts presented.<sup>[6]</sup>

525. That opinion considered the situation of a former client posting adverse comments about a lawyer, where the client did not disclose any confidential information and no litigation or arbitration was pending between the lawyer and former client. The committee concluded that the attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is "proportionate and restrained."

##### **6. Any Permissible Response Must Be Narrowly Tailored to the Issues Raised by the Former Client**

Even where the self-defense exception applies and a response is reasonably necessary to establish a defense or claim on behalf of the attorney, the disclosure of any confidential information must be

narrowly tailored to respond to the specific issues raised by the former client. In such situations, disclosure is therefore limited to relevant communications between the client and the attorney whose services gave rise to the breach of duty claim. See *Schlumberger Ltd.*, *supra*, 115 Cal.App.3d at 392; Los Angeles Bar Ass'n Form.Opn. 452 (1988) (on collecting a fee or defending against a malpractice action an attorney may disclose both confidential information and client secrets, but only to the extent necessary to the action"); *In re Rindlisbacher* (9th Cir. BP 1998) 225 B.R. 180, 183 (exception did not permit attorney to disclose in discharge proceeding client's admission that he had lied at dissolution trial; the attorney's disclosure was not relevant to the attorney's protection of his own rights against a breach of a duty by the debtor); see also Los Angeles Bar Ass'n Form.Opn. 519 (2007) (disclosure under section 958 must comply with the "relevancy" requirement of the section and the ethical directive that an attorney's disclosure pursuant to the exception be limited to the necessities of the case and its issues). Indeed, in California, disclosing confidential information not bearing on the issues of breach can subject a lawyer to discipline. See *Dixon v. State Bar* (1982) 32 Cal.3d 728, 735 (lawyer's declaration, in response to client lawsuit, that included gratuitous and embarrassing information about the client that "was irrelevant to any issues then pending before the court" and was found to have been made for the purposes of "harassing and embarrassing" the former client was grounds for discipline).

Even assuming Ev.C. §958 could apply in a public, non-legal forum, Attorney would have to limit any response to the general issues raised by the former client. In the Committee's view, disclosing the details and content of communications, the advice provided to the client, and the rationale for such advice, is not reasonably necessary to respond to and defend oneself from generalized assertions of malfeasance.

## CONCLUSION

Attorney is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty owed to the former client does not prohibit a response, Attorney's on-going duty of confidentiality prohibits Attorney from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about an attorney), or by an attorney against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, it may be inappropriate under the circumstances for Attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

## Footnotes

1. For purposes of this Opinion, "confidential information" is understood to include both attorney-client privileged information and information which, although not privileged, is nonetheless considered confidential under California Business & Professions Code section 6068(e)(1).

2. The Committee recognizes there are First Amendment implications with regard to the scenario presented in this Opinion. The First Amendment's application to this scenario is beyond the purview of this Committee. While not opining on the issue, the Committee does note that California case law has recognized the potential for limitations on an attorney's speech where such speech implicates the attorney's duties of loyalty or confidentiality to an existing or former client. See, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811.

The Committee also recognizes that the scenario presented could raise tort issues with regard to the former client's or Attorney's speech. The Committee does not opine on such issues.

3. The Committee assumes the exception in Bus. & Prof. C. §6068(e) does not apply for the purpose of this opinion.

4. See also CRPC 1-100(A) ("Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."); *General Dynamics Corp. v. Sup. Ct.* (1994) 7 Cal.4th 1164, 1190, fn. 6; *Cho v. Sup. Ct.* (1995) 39 Cal.App.4th 113, 121, fn. 2.

5. The Los Angeles County Bar Association Professional Responsibility and Ethics Committee reached similar conclusions in Los Angeles Bar Ass'n Form. Opn. 525. That opinion considered the situation of a former client posting adverse comments about a lawyer, where the client did not disclose any confidential information and no litigation or arbitration was pending between the lawyer and former client. The committee concluded that the

attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is "proportionate and restrained."

6. The Committee does not find L.A. County Bar Assoc. Formal Opinion 397 (1982) or State Bar of Arizona Opinion 93-02 dispositive.

L.A. County Bar Assoc. Formal Opinion 397 opines that where a former client has indicated that a malpractice action is being contemplated, an attorney may provide opposing counsel with a declaration that includes otherwise confidential information about the former client's knowledge regarding matters affecting a default judgment entered against the former client. The opinion, however, contains little substantive analysis, and is distinguishable since the disclosure was made in the context of a supervised legal proceeding in which the former client was asserting that it was "uninformed" with regard to the legal affairs being handled by the attorney. A finding by the court that the client was not appropriately informed could have a tangible effect on the attorney's potential exposure to the malpractice claim the former client affirmatively indicated he was contemplating.

State Bar of Arizona Opinion 93-02 concludes that an attorney can disclose otherwise confidential and privileged information to the author of a book regarding the murder trial of a former client, in response to assertions made by the former client to the author that the attorney had acted incompetently. The Arizona opinion involved an ethics rule patterned after Model Rule 1.6(d), which has not been adopted in California. The State Bar of Arizona concludes that limiting the exception's application to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(d) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely "superfluous." Although Arizona's rule is patterned on Model Rule 1.6, its opinion is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer's self-defense which states: "Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information except in response to a formal client charge of wrongdoing with a tribunal or similar agency. *When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer.*" State Bar of Arizona Opn. 93-02, pp. 4-5 (Emphasis added). This language is *not* part of the Restatement as presently adopted.

**All opinions of the Committee are subject to the following disclaimer:**

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September 29, 2016

Barbara Gaal  
Chief Deputy Counsel  
California Law Revision Commission  
Via Email to [bgaal@clrc.ca.gov](mailto:bgaal@clrc.ca.gov)

Re: Proposed Exception to Mediation Confidentiality and Community-Based Mediation

Dear Ms. Gaal:

I am writing to follow-up on the testimony I gave at the Law Revision Commission Hearing on July 22, 2016 in Los Angeles, regarding the negative impact that a mediation confidentiality exception would have on Community-Based Mediation Programs funded under the California Dispute Resolution Programs Act (DRPA), their volunteers and the people they serve, who are primarily indigent.

In Los Angeles County we have three types of DRPA-Funded Community-Based Mediation Programs: community, youth and day-of-hearing. I respectfully request that any possible confidentiality exception that the Commission might adopt not apply to any mediations (or the people involved in them) that are provided by DRPA-Funded Community-Based Mediation Programs.

I am not speaking about, or advocating on behalf of DRPA-Funded Court-Based Mediation Programs. I am solely speaking about DRPA-Funded Community-Based Mediation Programs.

As a clinical professor of law, Director of The Loyola Law School Center For Conflict Resolution (The CCR), former Director of the Disability Mediation Center (DMC), and a longtime volunteer in the Los Angeles County Bar Association's Community-Based Mediation Program during the 90s - I have had the opportunity to work or volunteer in a DRPA-Funded Community-Based Mediation Program for over 23 years.

Having personally mediated or conciliated thousands of disputes involving indigent people in these DRPA-Funded Community-Based Mediation Programs, I can testify to the fact that the vast majority of those served, face a wide variety of barriers (language, financial, legal, attitudinal, and physical, to name a few) to full participation in society, to legal services, and to full access to the justice system. Many choose a DRPA-Funded Community-Based Mediation Program as the venue of choice for resolving their disputes because they do not wish to become involved in the traditional justice system.

The vast majority of people who seek out community mediation services are minorities, persons of color, seniors, persons with disabilities, and veterans. Los Angeles County alone serves around 20,000 people each year in its DRPA-Funded Community-Based Mediation Programs, which we estimate accounts for approximately 1/5 of all those served by DRPA-Funded Mediation Programs throughout the state (100,000 people total – this number is an extrapolation from Los Angeles County data).

Los Angeles County statistics from 2015 indicate that those being served by DRPA-Funded Community-Based Mediation Programs are the intended beneficiaries under the DRPA Statute – largely members of Los Angeles County’s disenfranchised communities:

- A. Self-Identified Ethnicities
  - 0.7 percent American Indian/Native America
  - 7.9 percent Asian/Pacific Islander
  - 24.3 percent Black/African-American
  - 40.7 percent Hispanic/Latino
  - 19.9 percent White
  - 2.6 percent Multiple Ethnicities
  - 4.0 percent Other
  
- B. Self-Identified Yearly Income
  - 43 percent, less than or equal to \$20,000
  - 29.9 percent, \$20,000 to \$30,000
  - 11.1 percent, \$30,000 to \$50,000
  - 16 percent, greater than or equal to \$50,000

Of course, this is equally beneficial for our over-burdened court system, which by and large values the mediation services of DRPA-Funded Community-Based Mediation Programs to assist with its burgeoning caseload. Many thousands of cases never find their way to the court system. Others are diverted out of the court system to Community-Based Mediation Programs, including Day-of-Hearing DRPA-Funded Community-Based Mediation Programs that arrive to court on the day-of hearing to provide mediation services utilizing large groups of volunteers.

The CCR receives many dissolution cases from Self-Help Centers at the Courthouses, and we mediate once a week in the Dependency Court, by appointment. We also do a wide variety of cases considered to be classic community mediation cases: landlord/tenant, consumer debt, and neighbor-to-neighbor, to name a few. Even though we at The CCR provide service to the court, we are considered a community mediation program, as we only provide mediation by appointment.

At the California Law Revision Commission hearing on July 22, 2016, I proposed not having a confidentiality exception apply to any Community-Based Mediation Program funded under the DRPA statute. If the Commission believes that some kind of safeguard is absolutely necessary, and I argue that it is not, I proposed instead an automatic 10-day right of rescission. On further thought, and discussion with Day-of-Hearing Community-Based Mediation Programs, a 10-day right of rescission is not workable for all DRPA-Funded Community-Based Mediation Programs.

A 10-day right of rescission is not necessary, and not workable for Day-of-Hearing DRPA-Funded Community-Based Mediation Programs. Nor is it workable for other DRPA-Funded Community-Based Mediation Programs providing services at the courthouse by appointment, such as our own program.

The process in the courthouse generally requires placing the mediation agreement on the record post-mediation, on the day the mediation takes place, which ends the case. To disrupt this administrative process would place a significant burden on DRPA-Funded Community-Based Mediation Programs, the parties, and the court. Many people in these mediations sat on buses for hours to get to court. Many in Dependency Court say they lost their jobs because they missed work to attend court hearings. Getting back to the courthouse to put an agreement on the record ten days later would pose a significant burden on the people served by DRPA-Funded Community-Based Mediation Programs, and on the court.

In 1996, in my capacity as Vice-President of the Southern California Mediation Association, I wrote a Friend-of-the-Court letter to assist a DRPA-Funded Community-Based Mediation Program that had been unnecessarily subpoenaed. What I said then, still holds true today:

“Additionally, subjecting mediators to subpoena disrupts the delivery of services and is particularly detrimental to community mediation programs because of their shoe-string budgets and reliance on volunteer mediators. In this case, as in most cases, the usual response will be to fight off the subpoena. We submit that the costly, time-consuming and anxiety-provoking activity of fighting off subpoenas, for organizations with limited funding, could significantly impact the availability of volunteers to staff these community mediation programs...”

To have DRPA-Funded Community-Based Mediation Program volunteers, staff, and community users become involved in a later court proceeding would present an untenable situation. This would have a substantial and chilling impact upon the ability of DRPA-Funded Community-Based Mediation Programs to recruit volunteers, who may choose not to volunteer in cases where attorneys are involved so as not to face the possibility of being dragged into court. They are volunteering in a program that is community-based, and generally do not anticipate becoming involved in a lawsuit as a result of their pro bono efforts.

DRPA programs will also lose the trust of those we serve, who come to us to avoid court altogether, when they learn that using our services could cause them to become embroiled in a lawsuit about the process, or about the conduct of the professionals involved in the process. To have the exception apply to the small percentage of cases where there is an attorney involved in the process could cause programs and volunteers to refuse to mediate when attorneys are involved. This will greatly impact the indigent person who wants to come to the community mediation program, but may not be able to find service because there is an attorney involved in the case on the other side.

Many people who provide DRPA-Funded Community-Based Mediation services - both staff and volunteers - are not attorneys. While the vast majority of DRPA-Funded Community-Based Mediation cases do not involve attorney advocates, perhaps as many as ¼ of all cases in any given year may have an attorney involved, based on The CCR statistics. If an exception to mediation confidentiality applies to DRPA-Funded

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Community-Based Mediation Programs, we could be looking at 25,000 plus cases per year statewide, where DRPA staff, volunteers, and non-represented parties who went to the DRPA program to avoid the court system altogether, could get drawn into a court battle about attorney malpractice. This percentage could be higher in other jurisdictions.

We have already built safeguards in to our mediation process when legal action is required. While some cases necessarily require legal action, such as a divorce, the vast majority of cases we handle do not require legal action. In our divorce cases, we require the parties to take their divorce settlement agreement to a notary for signature, post-mediation, before it becomes a non-confidential, enforceable agreement under California Evidence Code Section 1123. This safeguard works and has a similar impact to a 10-day right of rescission. The parties get time to think about their agreement.

DRPA-Funded Community-Based Mediation Programs, DRPA staff, and DRPA volunteers need to continue to provide these services - which primarily and culturally take place outside of the court process - without substantial risk of disruption to service, or the risk that either the program, or the individuals involved in it, may becoming embroiled in a later court battle.

The CCR and the DMC – two programs I directed - have served well over 50,000 people in some capacity. The CCR's volunteers have clocked in over 100,000 pro bono service hours to the community. That is a small percentage of the service being provided by DRPA-Funded Community-Based Mediation Programs throughout the State. As a society, we can't afford to have these services disrupted.

Being an alternative to the court system is at the heart and soul of DRPA-Funded Community-Based Mediation Program Services, and also why they are an attractive option to so many. These DRPA-Funded Community-Based Mediation Programs provide undeniable benefits to many thousands of indigent people who cannot find help elsewhere, all while surviving on scant financial resources, stretched by dedicated staff and volunteers. Please don't let any possible mediation confidentiality exception apply to these DRPA-Funded Community-Based Mediation Programs.

On July 22, I promised to send the name of the group that I was advocating be exempt from any possible exception to mediation confidentiality. That group consists of:

All DRPA-Funded Community-Based Mediation Programs, their staff and volunteers, and all those who utilize their services.

Thank you for your consideration.

Sincerely,



Mary B. Culbert